UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

TESLA, INC.

and

MICHAEL SANCHEZ, an Individual

and

JONATHAN GALESCU, an Individual

and

RICHARD ORTIZ, an Individual

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL WORKERS OF AMERICA, AFL-CIO

Cases 32-CA-197020
32-CA-197058
32-CA-197091
32-CA-197197
32-CA-200530
32-CA-208614
32-CA-210879

GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL ADMINISTRATIVE LAW JUDGE'S ORDER DENYING RESPONDENT'S MOTION TO DISMISS, REQUEST FOR *DE NOVO* REVIEW, AND MOTION FOR JUDGEMENT AS A MATTER OF LAW

I. INTRODUCTION

The only legal issue before the Board is whether the presiding administrative law judge in this matter, Amita B. Tracy, (the Judge) abused her discretion when she rejected Respondent's Motion to Dismiss based on her reasonable conclusion that there are genuine issues of material fact over whether allegations amended into the operative complaint in this case are time barred under Section 10(b) of the Act. A defense rooted in Section 10(b) of the Act is a garden variety affirmative defense that is routinely litigated before administrative law judges and then reviewed by the Board if exceptions are filed. Although Respondent goes out of its way to paint a nefarious conspiracy theory employing baseless attacks on the integrity of the Board's investigative procedures and the Counsel for the General Counsel's litigation strategy,[1] Respondent, a multi-billion dollar company, is not the victim here. There is no irreparable harm if the Board follows extant law and denies this Special Appeal. To the contrary, Respondent will continue to have every opportunity before the Judge to respond to allegations that it violated the Act, including its right to show that the Counsel for the General Counsel has not met his burden under *Redd-I*'s "closely related" test to amend allegations into the complaint. But at this juncture, the burden remains with Respondent to establish that the Judge abused her discretion

[1] The General Counsel did not issue a subpoena to Elon Musk and did not file any brief in support of the Charging Parties' attempt to subpoena Mr. Musk. To the contrary, as Respondent knows, the General Counsel has steadfastly held the position that he will not call Mr. Musk as a witness. The General Counsel did, however, issue a subpoena for documents, as it routinely does in ULP hearings. These requests for documents do not relate to any allegation Respondent is claiming is barred by Section 10(b) of the Act because the allegations are oral statements made to employees. Put another way, no documents were requested in connection to these allegations. Further, General Counsel did not amend new allegations into the operative complaint in an attempt to gain any undue advantage. Rather, the timing of the amended allegations was based on when the Counsel for the General Counsel discovered these new allegations. Once uncovered, he moved as expeditiously as possible to amend the complaint. While the intent of the Counsel for General Counsel in amending the complaint in June 2018 before the opening of the hearing was to avoid any delay and to provide Respondent as much time as possible to mount its defense, knowing that Respondent's case would not likely begin until sometime in September 2018, it has somehow been misinterpreted and presented as gamesmanship. It is simply untrue.

when she denied its Motion to Dismiss. The burden is a heavy one and one that Respondent cannot meet.

II. BACKGROUND INFORMATION AND PROCEDURAL HISTORY

The hearing in this matter commenced on June 11, 2018, and is scheduled to resume on September 24, 2018. Prior to the hearing, the Regional Director for Region 32 (the Regional Director) of the National Labor Relations Board (the Board) issued an Amendment to the operative Second Amended Consolidated Complaint (Complaint), adding three Section 8(a)(1) allegations (the Amendment).[2] When the hearing commenced on June 11, 2018, Respondent Tesla, Inc., (Respondent) filed a Motion to Dismiss the Amendment with the Judge on the grounds that the allegations were barred by Section 10(b) and not "closely related" under the Board's test in *Redd-I*, 290 NLRB 1115 (1988). However, Respondent's Motion to Dismiss failed to demonstrate that there were no genuine issues of material fact regarding the issue of whether the allegations contained in the Amendment were "closely related" to the other allegations in the Complaint. As discussed more fully below, the Amendment allegations and the allegations in the Complaint arise out of Respondent's response to its employees' efforts to unionize with the Charging Party Union, the International Union, United Automobile, Aerospace, and Agricultural Workers of America, AFL-CIO (Union).[3] In this regard, the allegations involve Respondent's coordinated response to the employees' launch of a public organizing campaign, including leafleting, distribution of Union materials, wearing of Union t-shirts and insignia, and engaging in Section 7 social media protected activity while off-duty.

[2] The Amendment is contained in Exhibit I of Respondent's Special Appeal.

[3] Michael Sanchez, an individual, filed the charge in Case 32-CA-197020. Jonathan Galescu, an individual, filed the charge in Case 32-CA-197058. Richard Ortiz, an individual, filed the charge in Case 32-CA-197091. The Union filed the charges in Case Nos. 32-CA-197197, 32-CA-200530, 32-CA-208614, and 32-CA-210879.

Most notably, Respondent's unlawful response to its employees' Section 7 activities culminated in the discipline and termination of employees that were two of the most prominent figures in the Union organizing campaign.

On August 10, 2018, the Judge denied Respondent's Motion to Dismiss, without prejudice, on the basis that Respondent failed to demonstrate that there was no genuine issue of fact regarding the "closely related" issue and directed the parties to be prepared to litigate the merits of the allegations contained in the Amendment.

III. LEGAL STANDARD AND DISCUSSION

The Board accords judges significant discretion in controlling the hearing and directing the creation of the record. Section 102.35 of the Board's Rules and Regulations provides, in pertinent part, that a judge should "regulate the course of the hearing" and "take any other action necessary" in furtherance of the judge's stated duties and authorized by the Board's rules. As a result, the Board reviews rulings by administrative law judges under an abuse of discretion standard for both evidentiary and procedural rulings. See e.g. *Oaktree Capital Management, LLC*, 353 NLRB 1242, fn. 3 (2009); see also e.g. *Hispanics United of Buffalo, Inc.*, 349 NLRB 368, fn. 2 (2012). Under this standard, as will be shown below, the Board should deny the Special Appeal. While Respondent may disagree with the Judge's ultimate conclusion, she correctly defined the legal issue and applied the proper legal standard.

Realizing that the abuse of discretion standard is a hefty one, Respondent contends that it is entitled to a *de novo* review by the Board. It is essentially asking the Board to morph this Special Appeal into a prehearing motion which normally must be filed with the Board *before* the opening of a hearing before the administrative law judge. Such a view is completely contrary to

the Board's Rules and Regulations. Acceding to Respondent's request would only encourage parties to file procedurally defective motions with the Board.

A. The Judge Did Not Abuse Her Discretion By Concluding that There Are Genuine Issues of Fact Regarding the Issue of Whether the Amendment Is Time Barred Under *Redd-I*.

The Judge based her denial of Respondent's Motion to Dismiss, without prejudice, on her conclusion that Respondent failed to establish an absence of a material issue of fact as it relates to whether the asserted untimely allegations in the Amendment are "closely related" to timely allegations. See Section 102.24(b) (a motion to dismiss may be denied where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist). In its Special Appeal, Respondent erroneously asserts that the Judge misallocated the burden of proof for showing that an allegation is "closely related" from General Counsel to Respondent. Respondent misunderstands the Judge's Order denying its Motion. The Judge correctly held that, as the moving party in a motion to dismiss, Respondent bears the burden of demonstrating that there are no genuine issues of material fact regarding the closely related issue, which it failed to demonstrate in its Motion to Dismiss. Indeed, she ruled that her decision was "without prejudice" because she recognized that whether or not the Amendment allegations are "closely related" under *Redd-I*, and therefore not barred under Section 10(b) of the Act, will be litigated through her proceedings and allow her to dismiss the Amendment should General Counsel ultimately fail to prove that the allegations are "closely related" at the conclusion of the hearing.

As demonstrated by Respondent's Special Appeal, which argues the merits of the underlying issue for at least 10 pages, there are genuine issues of fact that must be resolved to

determine whether the Amendment is "closely related" and therefore not untimely under Section 10(b) of the Act. For instance, she must resolve factual issues under the "closely related" test such as whether the conduct alleged in the Amendment happened during the same time period and with the same object as the charge allegations and/or Complaint allegations; whether there is evidence to show a causal nexus between the Amendment allegations and the charge allegations and/or Complaint allegations; whether Amendments allegations are a part of the chain or progression of events of charge allegations and/or the Complaint allegations; and whether the Amendment allegations are part of the overall plan to undermine Union activity; among many other factual issues. It is plain to see there are many genuine issues of fact that precluded the Judge from granting Respondent's Motion to Dismiss. In other words, there can be no judgment as a "matter of law" because there are genuine issues of fact for the Judge to resolve. Accordingly, there is no basis to conclude she abused her discretion.

B. The Board Should Deny Respondent's Request for a Motion for a *De Novo* Review Because There Is No Basis to Convert This Special Appeal into a Prehearing Motion

Respondent's attempt to seek *de novo* review of the merits at this stage of litigation is improper because the matter is pending before the Judge. Under Section 102.24(b), any motion for judgment filed with the Board must be filed no later than 28 days prior to the scheduled hearing, or, where there are less than 28 days before the hearing, the motion must be filed "promptly." Respondent failed to comply with Section 102.24(b) because it failed to file the instant request with the Board "promptly" after the Regional Director issued the June 4, 2018 Amendment, filing the request several months after the start of the hearing. Moreover, Section 102.25 requires that the designated administrative law judge rule on all motions once the record

has opened. Through the instant Special Appeal, Respondent is essentially asking the Board to allow it to circumvent the Section 102.24(b) and 102.25 requirements, a move that would render the Section 102.24(b)'s 28-day requirement or "prompt[ness]" and Section 102.25's requirement that only administrative law judges rule on motions after the opening of a hearing effectively meaningless. Respondent has failed to offer any legal support or otherwise compelling argument to support its position that it should not be required to comply the Section 102.24 or 102.25 requirements. It relies on accusations of gamesmanship, undue advantage, irreparable harm, and manifest injustice. However, Respondent retains the opportunity to fully litigate whether or not the Amendment should be dismissed before the Judge and eventually with the Board. To the extent Respondent's Special Appeal seeks to be considered as a *de novo* Motion for Judgment as a Matter of Law (that is, a motion to dismiss), the Board should reject it because it is procedurally defective.

Even assuming Respondent's Motion for a Judgment as a Matter of Law is properly before the Board, it lacks merit. As the party moving, Respondent must establish the absence of a genuine issue of material fact, which it cannot do because the "closely related" test requires that certain facts must be resolved as described above.

C. Even if the Board Engages in a *De Novo* Review, Respondent's Motion for Judgment as a Matter of Law Should Be Denied Because the Board Must Apply the *Redd-I* "Closely Related" Test Upon Review of the Entire Record

The Board is not in a position to engage in a *de novo* review because the *Redd-I* "closely related" test requires the Board to review the *entire* record. Under *Redd-I*, the Board looks to *either* "whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge" or "whether the otherwise untimely allegations arise from the same

factual situation or sequence of events as the allegations in the pending timely charge." *Redd-I*, above at 1118. In order to be able to conduct such an inquiry, the Board must inevitably look at the *entire* record.[4] For example, in *Redd-I*, the Board made its determination that an allegation was closely related because it evaluated the entire record to review whether the allegedly untimely allegations were part of the same factual situation or sequence of events as the timely charges. Granting Respondent's motion for judgment as a matter of law would effectively require the Board to make a determination without even knowing the events of these cases, their sequence, or their import in relation to the asserted untimely and barred allegations. Notably, the Board in *Redd-I* and *Heaven*[5], unable to determine from the record whether the alleged untimely allegations are closely related to allegations of a timely charge, remanded to allow litigation both on the merits and on the "closely related" issue. *Columbia Textile Services*, 293 NLRB 1034, fn. 11 (1989). This common-sense approach allows the Board to have the opportunity to review the parties' assertions under each of the *Redd-I* prongs and the Board has not departed from this approach. The Board reiterated this approach in *Carney Hospital*, 350 NLRB No. 56 (2007), which is relied upon heavily by Respondent, where the Board explicitly stated in footnote 11 that the *Redd-I* "closely related" test is not limited to the pleadings. The same is true in *Charter Communications*, 366 NLRB No. 46 (2018), which Respondent asserts supports its request, where the Board's analysis rests on the record developed, in part, through testimony at the underlying unfair labor practice hearing rather than merely the pleadings. Indeed, Respondent

[4] General Counsel will resume his case in chief when the hearing reopens on September 24, 2018. Although the application of the *Reddi-I* test is premature because the record is not complete, General Counsel asserts that the record evidence thus far establishes that the Amendment allegations are closely related to other Complaint allegations similarly arising out of Respondent's unlawful response to its employees' organizing efforts. See also General Counsel's Opposition to Respondent's Motion to Dismiss, pp. 3-6, attached as Exhibit 3 to Respondent's Motion.

[5] 290 NLRB 1223, 1224 (1988).

itself cites to the unfair labor practice charges in *Charter Communications*, documents, which are themselves outside of the pleadings.

Thus, the Board should reject Respondent's contention that the Board's application of the *Redd-I* "closely related" test is accomplished by ignoring all matters outside the relevant pleadings. Respondent's argument rests on its interpretation of a D.C. circuit court case, *Hyundai America Shipping Agency, Inc. v. NLRB*, 805 F.3d 309 (2015), a non-precedential case. In Respondent's assessment of *Hyundai*, Respondent asserts that the "closely related" inquiry requires ignoring all matters outside the parties' pleadings. Respondent fails to point to *any* Board case following the circuit court's holding in *Hyundai* or any other circuit court case adopting the same principle.

Moreover, Respondent's conduct is inconsistent with its reliance upon the *Hyundai* analysis. Throughout Respondent's Motion to Dismiss and in its Special Appeal, Respondent relies heavily on matters *outside* the pleadings. For example, Respondent devotes numerous pages of argument and analysis to matters it asserts were investigated and dismissed, something the *Redd-I* Board explicitly stated was not relevant to the applicable inquiry and something the *Hyundai* court would not have considered.

D. Even if the Board Agrees with Respondent's Contention that Only the Pleadings May Be Considered, the Closely Related Test Is Still Met

Although not the proper inquiry here, if a *de novo* review is conducted solely on the pleadings, General Counsel can still meet the *Redd-I* test. While the Amendment allegations were not specifically alleged in any charge and not mentioned during the investigation of the charges because, as mentioned above, the Amendment was based on evidence discovered after

the issuance of the Complaint, the Amendment allegations nonetheless meet the "closely related" test as shown from the pleadings as described below.[6]

Here, the Amendment alleges that on June 7, 2017, Respondent Chief Executive Officer Elon Musk and Chief People Officer Gaby Toledano violated Section 8(a)(1) of the Act when, in a single conversation with Respondent employees, they solicited employee complaints about safety issues, impliedly promised to remedy those complaints if the employees refrained from union activity, made a statement of futility, and told the employees that no one at Respondent's Fremont, California facility wanted a union and queried the workers about why they would want to pay union dues. The allegations in the Complaint as well as the Amendment arise out of the employees ongoing multi-year organizing efforts. There is, however, more than a mere chronological relationship. There exists a meaningful nexus to the timely filed charges based on Respondent's coordinated response to discourage the employees from further engaging in Section 7 activities. Indeed, the alleged June 7, 2017 meeting described in the Amendment with Toledano and Musk was in regards to safety issues and it occurred just two weeks after Respondent attempted to interfere with the employees who lawfully distributed Union leaflets about their workplace safety concerns as alleged in Paragraphs 7(n) through (p) of the Second Amended Consolidated Complaint. The Amendment falls into the sequence of the extant

[6] While the charges do not allege the specific conduct or actors that engaged in the conduct described in the Amendment, the charge in 32-CA-20814, filed October 25, 2017, does allege "intimidating and harassing employees for their Section 7 activities" within the six month period preceding the charge. Such charge covers the period of the Amendment and the language appears broad enough to cover the Amendment while narrow enough to have given Respondent sufficient notice as to the types of violations that may potentially be alleged.

al\legations involving similar types of statements of futility and statements to discourage Section 7 activity.[7]

E. Respondent Fails to Demonstrate Any Prejudice

In its Special Appeal, Respondent asserts that the General Counsel has "prejudiced Tesla" without any providing any credible argument. Respondent has not demonstrated how it will suffer prejudice as the allegations at issue relate to *one* conversation with employees and it has had ample time to prepare its defense before the resumption of the hearing on September 24, 2018. Moreover, to the extent Respondent argues that it has suffered prejudice because the Regional Director did not issue the Amendment until shortly before the hearing, there exist a plethora of cases involving the adding of additional allegations at the start of hearing, during a hearing, at the conclusion of hearing, and even, in limited circumstances, after a hearing has concluded through post-hearing briefing.[8] Accordingly, any such contention should be rejected by the Board.

IV. CONCLUSION

For the reasons set forth above, the General Counsel respectfully requests that the Board deny Respondent's Request for Special Permission to Appeal from the Judge's Order Denying Respondent's Motion to Dismiss. However, if the Board permits the Appeal, General Counsel

[7] Indeed, Respondent's anti-Union campaign is ongoing. On August 23, 2018, the Regional Director issued a Complaint in Case 32-CA-220777, alleging that a May 20, 2018 tweet by Mr. Musk violated Section 8(a)(1) of the Act. On the same day, General Counsel filed a Motion to Consolidate the Complaint with the Second Amended Consolidated Complaint which remains pending before the Judge.

[8] See, e.g., *Folsom Ready Mix, Inc.*, 338 NLRB 1172, fn. 1 (2003); see also, e.g., *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3, fn. 8 (2015), enfd. 651 Fed. Appx. 34 (2d Cir. 2016) (motion to amend granted during hearing); *Remington Lodging & Hospitality, LLC*, 363 NLRB No. 112, slip op. at 1, fn. 1 (2016) (motion to amend granted during hearing); *Stagehands Referral Service*, 347 NLRB 1167 (2006) (motion to amend at the conclusion of hearing); *Roundy's Inc.*, 356 NLRB 126 (2010), enfd. 674 F.3d 638, 646-647 (7th Cir. 2012) (remanding to administrative law judge for additional evidence after the General Counsel alleged a new theory in his post hearing brief).

respectfully requests that the Board affirm the Judge's Order and deny Respondent's Request for *De Novo* Review and its Motion for Judgment as a Matter of Law.

DATED AT Oakland, California this 30th day of August 2018.

/s/ Edris W.I. Rodriguez Ritchie

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